

IN THE SUPREME COURT FOR THE STATE OF ALASKA

In Re 2011 Redistricting Cases.) **Supreme Court Case No. S- 14721**
)
) Trial Court Case No. 4FA-11-2209-CI
) (Consolidated Cases)
) 4FA-11-2213 CI
) 1JU-11-782 CI

**ALASKA REDISTRICTING BOARD’S PETITION FOR REVIEW FROM THE
SUPERIOR COURT OF THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT AT FAIRBANKS,
THE HONORABLE MICHAEL P. McCONAHY, PRESIDING**

The Alaska Redistricting Board (“Board”) respectfully petitions this Court, pursuant to Alaska Appellate Rules 402 and 403, for review of the Superior Court’s June 11, 2013, Order (“the Order”).¹ The Order wrongly interprets Article VI, section 11 of the Alaska Constitution as starting the litigation process anew should anyone wish to challenge the Board’s final plan adopted on remand.² For all the reasons set forth below, this Court should grant the Board’s Petition for Review and reverse the Superior Court’s order.

I. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

On December 28, 2012, this Court issued its order, remanding the Amended

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¹ A copy of the Superior Court’s Order dated June 11, 2013, is attached hereto as Appendix A.

² The Board only seeks review from this Court as to the third point of the Order.

Proclamation Plan back to the Board.³ This Court instructed the Board to redraw a plan that only complied with the Alaska constitutional requirements and without any consideration to the federal Voting Rights Act.⁴

The Board held its first meeting after this Court's order on remand on February 12, 2013.⁵ The Board discussed this Court's December 28, 2012, order, and a draft timeline for complying with that order.⁶ The Board also discussed the pending case before the United States Supreme Court, *Shelby County v. Holder*, which challenged the validity of Section 5 of the Voting Rights Act, and its effect on the Board's process on remand.⁷ The Board discussed waiting until the United States Supreme Court issued a decision in *Shelby County* before beginning its process on remand because it could potentially moot steps 2 and 3 of the *Hickel* process, as well as the need to seek preclearance.⁸ The Chairman of the Board then proposed a draft timeline with the ultimate goal of having the *Hickel* process, including review and preclearance from the Department of Justice, if necessary, more than ninety days before the filing deadline for

³ Given this Court's familiarity with this matter, the Board hereby incorporates as though fully set forth herein the proceedings and pleadings that have transpired in this matter since receiving the census data on March 15, 2011. The Board will instead focus on the proceedings that have occurred since this Court's order of remand dated December 28, 2012.

⁴ *In re 2011 Redistricting Cases*, 294 P.3d 1032 (Alaska 2012).

⁵ See Board Meeting Transcript (February 12, 2013), attached to Appendix D.

⁶ See *id.*

⁷ *Shelby County v. Holder, et al.*, 270 F.R.D. 16 (D.D.C. 2010), *cert. granted*, 81 U.S.L.W. 3264 (U.S. November 9, 2012) (No. 12-96).

⁸ Bd. Tr. at 55:15-56:22.

the 2014 elections.⁹

On March 19, 2013, the Board filed a Request for Clarification asking this Court for guidance as to whether (1) this Court's reference to "new plan for the 2014 elections" refers to a new *Hickel* plan, or any new final plan adopted by the Board; and (2) whether the Board is prohibited from using the current configuration of any district from the Interim Plan in any "new plan."¹⁰ The Riley Plaintiffs' filed a partial opposition, with "suggestions" that this Court "clarify other issues not previously addressed" on March 26, 2013.¹¹ In reference to their "suggestion" that this Court order the Board to produce a plan in time to allow for judicial review, the Riley Plaintiffs asked this Court to allow "adequate time for citizen participation followed by informed judicial review" for the "highly likely" new litigation by new challengers of the Board's final plan adopted on remand.¹²

On April 24, 2013, this Court issued an order on the Board's Motion for Clarification, clarifying the two points raised by the Board.¹³ As to the Riley Plaintiffs' "suggestions," this Court ordered as follows:

Whether Article VI, section 10 of the Alaska Constitution requires public hearings following the adoption of the Board's plan or plans and whether the Board's proposed

⁹ *Id.* at 56:23-57:6.

¹⁰ Alaska Redistricting Board's Request for Clarification (March 19, 2013).

¹¹ Partial Opposition to Board's Motion for Clarification and Suggestion for the Court to Clarify Other Issues Not Previously Addressed (March 26, 2013).

¹² *Id.* at 3-4.

¹³ Order (April 24, 2013).

timeline is sufficient to allow judicial review of the Board's work are not properly before this court. Any party may seek to have these matters heard in the superior court.¹⁴

The Riley Plaintiffs filed a request for a "Status Hearing Re: Remand" with the Superior Court on May 1, 2013.¹⁵ The Superior Court issued an order on May 2, 2013, finding no need for a status hearing, but allowing any party that wished to have the two issues identified by this Court in its April 24, 2013, order heard by the Superior Court "to file pleadings identifying the relief they seek under this limited scope of jurisdiction."¹⁶

Both the Riley Plaintiffs and the Petersburg Plaintiffs filed motions seeking an order that (1) dictates the Board's schedule for drafting a new final redistricting plan in compliance with this Court's order on remand; and (2) mandates the Board hold public hearings on the plan it intends to adopt.¹⁷ Neither motion specifically asked the Superior Court to address the ability for new parties to bring forth new challenges once the Board adopted a final plan on remand.¹⁸ The Riley Plaintiffs mentioned, in a footnote, that it would be seeking at some point in the future "a broader order of remand

¹⁴ *Id.*

¹⁵ Attorney's Request for Hearing (May 2, 2013), attached hereto as Appendix B.

¹⁶ Order Regarding Request for Hearing (May 2, 2013), attached hereto as Appendix C.

¹⁷ *See* Riley Plaintiff's [sic] Motion for Order Establishing Deadlines and to Holding Hearings on Final Plan, attached hereto as Appendix D. *See* Petersburg Plaintiffs' Motion for Adequate Timeline and Public Hearings on the Final Redistricting Plan, attached hereto as Appendix E.

¹⁸ *See* App. D, App. E.

addressing...the ability of other parties to bring such challenges....”¹⁹ The Riley Plaintiffs also eluded to the possibility of a challenge involving other parties, which they noted the Board has suggested it would challenge.²⁰ However, the Riley Plaintiffs did not ask the Superior Court to establish whether the court would permit new challenges to the Board’s final plan on remand, brought by new parties.²¹ The Petersburg Plaintiffs also mentioned the possibility of litigation by new parties in passing, but never asked the Superior Court to rule on the matter.²² The Board opposed both motions.²³

On May 30, 2013, the Superior Court issued an order mandating public hearings be held on any *Hickel* plan(s) promulgated by the Board, and finding the Board’s draft timeline was not sufficient to allow for judicial review.²⁴ The Superior Court declined to set specific deadlines for the Board under the parameters of this Court’s April 24, 2013, order, but agreed with the plaintiffs that “the Board’s timeline is not sufficient

¹⁹ App. D at 2 n.2.

²⁰ *Id.* at 4.

²¹ *Id.* at 5-6 (“the Riley Plaintiffs request the Court to order a deadline by which time the Redistricting Board shall proclaim a Final Redistricting Plan, and that the Board shall develop proposed plans and hold hearings on those proposed plans prior to such proclamation.”)

²² *See* App. E.

²³ Defendant Alaska Redistricting Board’s Consolidated Opposition (May 22, 2013), attached hereto as Appendix F.

²⁴ Order Regarding Hearing on Board Plan(s) and Proposed Board Time Frame (May 30, 2013), attached hereto as Appendix G.

time to promulgate a plan, have hearings, and seek judicial review.”²⁵ In a footnote, the Superior Court “recommended” this Court order the Board to follow a proposed timeframe set forth by the Superior Court.²⁶

That same day, this Court issued a notice clarifying jurisdiction in this case was returned to the Superior Court with this Court’s December 28, 2012, order of remand.²⁷ Based on this notice, the Riley Plaintiffs filed a Motion for Reconsideration of the Superior Court’s May 30, 2013, order on June 4, 2013.²⁸ The Riley Plaintiffs argued the Superior Court issued its May 30, 2013, order based on an incorrect assumption that this Court retained jurisdiction over the matter except for the two specific points identified in this Court’s April 24, 2013, order.²⁹ The Riley Plaintiffs therefore asked the Superior Court to issue an order setting deadlines for the Board to adopt its final plan, which would allow sufficient time for judicial review, and ordering the Board to hold public hearings on the proposed plans prior to adoption of a final plan.³⁰ The Petersburg Plaintiffs, along with the Calista Corporation and the Fairbanks North Star

²⁵ *Id.*

²⁶ *Id.* at n.12. The Board disagreed with the Trial Court’s decision, including its holding that Article VI, Sec. 11 mandated public hearings on remand. However, the Board determined that it was not in the public interest to seek interlocutory appellate review of that decision because the Board had always intended to allow public input through public hearings and could seek review of that issue to provide guidance to future boards in any merits appeal.

²⁷ Notice (May 30, 2013).

²⁸ *See* Riley Plaintiff’s [sic] Motion for Reconsideration (June 4, 2013), attached hereto as Appendix H.

²⁹ *Id.*

³⁰ *Id.*

Borough, joined in the Riley Plaintiffs' Motion for Reconsideration.³¹

The Board opposed the Riley Plaintiffs' Motion for Reconsideration as moot since the Board had adopted a schedule for adopting a *Hickel* plan that closely tracked the Superior Court's "recommended" schedule in footnote 12 of its May 30, 2013, order, and that allowed for public hearings on the Board's draft *Hickel* plan(s).³² The Superior Court, on June 11, 2013, issued an order granting the Riley Plaintiffs' Motion for Reconsideration and ordering the Board's adopted timeline as the required deadline for the *Hickel* process.³³ The Superior Court also found

Under the Alaska Constitution any qualified voter may apply to the superior court to compel the Board to perform its duties under Article VI or to correct any error in redistricting. Application to compel correction of any error in redistricting must be filed within thirty days following the adoption of the final redistricting plan and proclamation by the Board. This court urges any qualified voter with an objection to the redistricting plan to file within 10 days of the adoption of the final redistricting plan in order to expedite the judicial process.³⁴

The Board seeks review from this Court of this additional finding whereby the Superior Court, without a request to do so, misinterpreted Article VI, section 11 of the Alaska

³¹ See Petersburg Plaintiffs' Joinder in Riley Plaintiffs' Motion for Reconsideration (June 10, 2013), attached hereto as Appendix I; Calista Corporation, Association of Village Council Presidents, and Bristol Bay Native Corporation Notice of Support of Riley Plaintiff's [sic] Motion for Reconsideration (June 10, 2013), attached hereto as Appendix J; *Amicus Curiae* Fairbanks North Star Borough's Notice of Support of Riley Plaintiffs' Motion for Reconsideration (June 10, 2013), attached hereto as Appendix K.

³² See Alaska Redistricting Board's Opposition to Riley Plaintiffs' Motion for Reconsideration (June 10, 2013), attached hereto as Appendix L.

³³ App. A at 4.

³⁴ *Id.* at 4-5.

Constitution and invited challenges to the Board's final adopted plan on remand, starting the litigation process anew.

II. STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the Alaska Superior Court erred by interpreting Article VI, section 11 of the Alaska Constitution as allowing new challenges by new parties to the Board's final adopted plan on remand and starting the litigation process over.

III. CRITERIA FOR INTERLOCUTORY REVIEW

This petition satisfies the criteria set out in Alaska Appellate 402(b).

A. Postponement of Review Will Result in Injustice and Unnecessary Delay and Expense.

The Superior Court's misinterpretation of Article VI, section 11 of the Alaska Constitution has placed the Board in a compromising position, as well as the Alaskan voters. If left undisturbed, the Board will now be forced to start the litigation cycle all over again, defending its final plan adopted on remand against new challenges by new parties. The Superior Court's order contemplates a litigation process exactly as what transpired over the past two years, with a formal complaint, discovery, motion practice, and trial. The Superior Court's order also does not limit the challenges to new districts, which are different from those in the original Proclamation Plan. This means new parties could possibly bring new challenges to districts that may not have not substantially changed, but were never challenged within the timeframe set forth in Article VI, section 11. The Superior Court has created a "second bite at the apple" scenario, forever locking the Board into an endless cycle of litigation. Only if this

Court grants the Board's petition for review will the Board, and this Court, have an opportunity to prevent this unnecessary and expensive cycle of endless litigation. Otherwise, the Superior Court's order will evade appellate review, or will only allow such review after another round of expensive and time-consuming litigation.

B. The Order Involves an Important Question of Law and May Advance an Important Public Interest Which Will Be Compromised if the Board's Petition is Not Granted.

The Superior Court's misinterpretation of Article VI, section 11 of the Alaska Constitution sets forth a dangerous precedent that will affect all future Alaska redistricting boards. As explained above, the Superior Court's order effectively creates an endless litigation cycle contrary to the plain text of the Alaska Constitution. This will prevent Alaska voters from having a consistent redistricting plan in place for every election cycle until the next census, which will only magnify the political disruption and voter confusion inherent in every redistricting. The legislature provided tight deadlines to ensure that only one redistricting plan is effective for the whole census cycle, only permitting challenges to the plan within 30 days following the adoption of the plan. The Superior Court's decision to the contrary is erroneous.

The Superior Court's decision poses an important question of law – whether Article VI, section 11 of the Alaska Constitution starts the litigation process over every time the Board adopts a new plan, even on remand. This important question advances an important public interest – the Alaskan voters' interest in having a consistent redistricting plan for the census cycle. As noted above, the answer to this question will

evade appellate review until after yet another round of unnecessary, expensive, and time-consuming litigation.

IV. THE SUPERIOR COURT'S DECISION IS ERRONEOUS

A. The Superior Court Wrongly Interpreted Article VI, Section 11 of the Alaska Constitution.

Article VI, section 11 of the Alaska Constitution provides:

Any qualified voter may apply to the superior court to complete the Redistricting Board, by mandamus or otherwise, to perform its duties under this article or to correct any error in redistricting. Application to compel the board to perform must be filed not later than thirty days following the expiration of the ninety-day period specified in this article.³⁵

The ninety-day period specified in this article is defined in Article VI, section 10 as the ninety days “after the board has been appointed and the official reporting of the decennial census of the United States.”³⁶ Thus, under the plain language of the Constitution, suits challenging the Board’s plan must be filed no later than 30 days following the adoption of the original Proclamation Plan. The Board received the 2010 Census data on March 15, 2011, and adopted a Proclamation Plan within ninety days on June 13, 2011. Any parties wishing to challenge the Board’s plan had to do so by July 15, 2011. Nothing in the Constitution restarts this clock to allow for full-blown litigation should the Board have to redraw on remand.

The Superior Court erroneously interprets Article VI, section 11 as, in fact, allowing for a restart of the litigation process. Its decision provides no limitation on the

³⁵ Alaska Const. art. VI, § 11 (emphasis added).

³⁶ Alaska Const. art. VI, § 10.

types of challenges or the process. It ignores the plain language of the Constitution, which mandates any challenges to the plan be filed within 30 days of the Board's adoption of a final plan ninety days after receiving the census data. This timeline has come and gone. The Superior Court's decision to the contrary is erroneous.

The Superior Court's order contemplates starting the litigation process anew, with any qualified voter filing a complaint thirty days after the Board adopts its final plan on remand, although recommending the new challengers file their complaint within ten days.³⁷ Then the parties would follow the ordinary litigation process with discovery, dispositive motions, and a trial, the exact process the challenges filed within thirty days of the Board adopting its final plan within ninety days of receiving the Census data in 2011 followed. This process is not only contrary to the plain language of the Alaska Constitution, but is also contrary to the process the Superior Court itself followed on the first remand and the process used in previous redistricting cases.

For example, in 2001, the Board adopted a new plan on remand and filed a motion to expedite notice of compliance and request for entry of final judgment.³⁸ The court invited objections to the Board's motion and upon receipt, the court held a status conference to discuss the need for further proceedings.³⁹ At the status conference, the parties disputed whether a further evidentiary hearing would be needed or whether the

³⁷ App. A at 4-5.

³⁸ *In re 2001 Redistricting Cases*, 47 P.3d 1089, 1092-1093 (Alaska 2002).

³⁹ *Id.* at 1092.

legality of the plan could be decided based on the pleadings of the parties.⁴⁰ The court then reviewed the objections and the Board's response to same, and ultimately concluded no evidentiary hearing was necessary to resolve the objections to the amended plan and ruled the Amended Redistricting Plan fully complied with the Supreme Court's order of remand.⁴¹

The current redistricting case has already followed a similar process. When this Court first remanded the plan to the Board on March 14, 2012, the Board adopted an Amended Proclamation Plan and filed a Notice of Compliance with the Superior Court.⁴² The Superior Court allowed the plaintiffs and *amicus curiae* to file objections to the Board's Amended Plan and provided the Board the opportunity to respond to the same.⁴³ The Superior Court also noted it would issue a scheduling order discussing the possibility of further hearings and timelines after the briefing had been received.⁴⁴ The Superior Court ultimately rejected the Board's plan as not compliant with this Court's order of remand without any hearings or briefing on April 20, 2012, which the Board appealed to this Court.⁴⁵

Now, after another remand, the Superior Court has abandoned its own process

⁴⁰ *Id.*

⁴¹ *Id.* at 1093.

⁴² Notice of Compliance with Order of Remand and Request for Entry of Final Judgment (April 10, 2012).

⁴³ Order Regarding the Board's Notice of Compliance and Adoption of a New Plan (April 12, 2012).

⁴⁴ *Id.*

⁴⁵ Order Regarding the Board's Notice of Compliance (April 20, 2012).

and the process used by courts during previous redistricting cycles and instead decided, *sua sponte*, to restart the litigation process over and without providing the Board an opportunity to respond. The Board had no idea the Superior Court was even considering this issue, especially in light of the plain language of the Alaska Constitution and the Superior Court's previous process on remand. The Superior Court had previously ordered the Board to follow an expedited schedule on remand "to promulgate a plan, have hearings, and seek judicial review."⁴⁶ The Superior Court gave no indication it would also require the Board to prepare for another round of litigation. The Superior Court's order wrongly interprets Article VI, section 11 of the Alaska Constitution and unfairly prevented the Board from being heard before the Court did so. Only if this Court grants the Board's Petition for Review will the Board have the opportunity to respond to this erroneous decision.

B. The Superior Court's Order is Contrary to the Intent and Purpose of Article VI, Section 11 of the Alaska Constitution.

Redistricting is a disruptive process that creates political disruption and voter confusion. It is inherently political by nature with legal challenges inevitable. As Justice Matthews notes in his dissent to this Court's December 28, 2012, order of remand, "the Alaska Constitution contains provisions designed to ensure that one redistricting plan will be effective for the whole of a census cycle" to combat these undesirable effects of redistricting.⁴⁷ The tight deadlines in Article VI, section 10 and

⁴⁶ App. G at 4.

⁴⁷ *In re 2011 Redistricting Cases*, 294 P.3d at 1047.

11 are designed to achieve this goal and produce a final plan that will serve for the entire census cycle.⁴⁸

The Superior Court's order upends the legislature's purpose and instead permits what the legislature tried to prevent – an endless litigation cycle with the potential for inconsistency for the census cycle. Just as every other redistricting case in Alaska's history, any permitted new challenges will most assuredly lead to another appeal. Under the Superior Court's interpretation of Article VI, section 11, the process of legal challenges restarts anew after every remand amplifying the "undesirable effects" of redistricting.

The Board is not advocating that there can be no new challenges or challengers to a new redistricting plan adopted on remand, or that any new plan is insulated from legal review. At the same time, there is nothing in the Alaska Constitution that suggests that the litigation process is wiped clean and completely restarted every time there is a remand. Under the Superior Court's interpretation, if a redistricting board is required to redraw even one district on remand, the entire redistricting plan would be subject to new legal challenges by "any qualified voter," whether or not those challenges were previously raised within the constitutionally mandated thirty day time period, and a new trial, complete with discovery, depositions, etc., would be required. Interpreting Article VI, section 11 in such a manner effectively nullifies its plain language and defeats its purpose. The appropriate process on remand is the same

⁴⁸ *Id.*

process historically followed in past redistricting cycles: (1) after adoption of its new redistricting plan that complies with this Court's Order, the Board submits that plan to the Superior Court; (2) a timeline is set to allow for objections/challenges to the plan for (a) non-compliance with this Court's December 28, 2012, order and (b) failure to meet legal requirements for any substantially reconfigured election districts; (3) the Board is provided an opportunity to respond to the objections/challenges; and (4) if necessary, an evidentiary hearing is scheduled on the objections/challenges.

V. STATEMENT OF RELIEF SOUGHT

The Board respectfully requests that this Court grant review and decide this narrow and important legal issue on its merits. After consideration of the arguments of the parties, this Court should reverse the Superior Court's Order, and find that the Alaska Constitution does not allow the litigation process to begin anew when the Board adopts a new plan on remand and that the proper process is as outlined by the Board above. The Board requests a decision from this Court by July 19, 2013, so that its redrafting process is not delayed.

DATED at Anchorage, Alaska this 21st day of June 2013.

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CERTIFICATE OF TYPEFACE

Pursuant to Alaska Rule of Appellate Procedure 513.5(c)(2), I hereby certify that the foregoing document was prepared in typeface 13 point Times New Roman.

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June 2013, a true and correct copy of the foregoing document was served on the following via **US Mail with a courtesy copy via Electronic Mail:**

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APPENDIX

- Appendix A: Order Regarding Riley Plaintiffs' Motion for Reconsideration (June 11, 2013)
- Appendix B: Attorney's Request for Hearing (May 2, 2013)
- Appendix C: Order Regarding Request for Hearing (May 2, 2013)
- Appendix D: Riley Plaintiff's [sic] Motion for Order Establishing Deadlines and to Holding Hearings on Final Plan (May 15, 2013)
- Appendix E: Petersburg Plaintiffs' Motion for Adequate Timeline and Public Hearings on the Final Redistricting Plan (May 15, 2013)
- Appendix F: Defendant Alaska Redistricting Board's Consolidated Opposition to Riley Plaintiffs' Motion for Order Establishing Deadlines and to Holding Hearings on Final Plan and Petersburg Plaintiffs' Motion for Adequate Timeline and Public Hearings on the Final Redistricting Plan (May 22, 2013)
- Appendix G: Order Regarding Hearing on Board Plan(s) and Proposed Board Time Frame (May 30, 2013)
- Appendix H: Riley Plaintiff's [sic] Motion for Reconsideration of Order Regarding Hearing on Board Plan's and Proposed Board Time Frame (May 30, 2013) (June 4, 2013)
- Appendix I: Petersburg Plaintiffs' Joinder in Riley Plaintiffs' Motion for Reconsideration (June 10, 2013)
- Appendix J: Calista Corporation, Association of Village Council Presidents, and Bristol Bay Native Corporation Notice of Support of Riley Plaintiff's [sic] Motion for Reconsideration (June 10, 2013)
- Appendix K: *Amicus Curiae* Fairbanks North Star Borough's Notice of Support of Riley Plaintiffs' Motion for Reconsideration (June 10, 2013)
- Appendix L: Alaska Redistricting Board's Opposition to Riley Plaintiffs' Motion for Reconsideration of Order Regarding Hearing on Board Plans and Proposed Board Time Frame (May 30, 2013) (June 10, 2013)